2 Appellate Rulings Offer Clickwrap Enforcement Road Map

By **Brian Willett** (August 20, 2025)

Brian Willett

It may seem like a curious question: Does clicking "I agree" really signal agreement? And if so, how can a company prove it? If your client's website employs so-called clickwrap agreements, these inquiries are far from inane.

Although clickwrap agreements are, at their core, controlled by basic contract law, the nature of online agreements presents complications that can make the principle of mutual assent murky.

Thankfully, the U.S. Courts of Appeal for the Fourth and Eleventh Circuits recently issued informative rulings, in Austin v. Experian Information Solutions and Newton v. Experian Information Solutions, which contain practical advice for the presentation of clickwrap agreements on websites and how companies can sufficiently demonstrate notice and assent when attempting to enforce contractual terms.

Clickwrap Basics

Clickwrap agreements are contracts in which consumers agree to be bound by terms and conditions viewable via a hyperlink by clicking a button on a website. Unlike signing a paper contract, the terms are not placed right in front of the consumer — rather, the consumer needs to take an extra step to access the agreement.

Clickwrap agreements are an efficient, effective — and from a web designer's perspective, attractive — way to bind consumers to contractual terms without interrupting a purchase or enrollment process. Because of clickwrap agreements' subtle nature, some consumers may not fully recognize the implications of clicking a button or ticking a box, especially since actually reading the hyperlinked terms is an afterthought.

As a result, the enforceability of clickwrap agreements is often challenged — despite the long history of courts upholding their validity, e.g., the U.S. Court of Appeals for the Tenth Circuit's 2012 ruling in Hancock v. American Telephone and Telegraph Co. Inc. and the U.S. Court of Appeals for the Second Circuit's 2017 decision in Meyer v. Uber Technologies Inc.

Typically, consumers will claim that they were not aware of, and could not possibly have agreed to, the terms of the clickwrap agreement. Disputes over the enforceability of clickwrap agreements often arise when the resolution of the issue means the difference between individual arbitration and class action litigation.

Obviously, the former is preferable for commercial defendants. But no matter how bulletproof the actual terms of the agreement are, they're just pixels on a page if a company can't prove a consumer assented to be bound.

Appellate Court Guidance

Based on rulings from the Fourth and Eleventh Circuits in the past few weeks, effectively advocating for the company's position requires understanding and articulating the consumer experience.

Austin v. Experian Information Solutions Inc.

In Austin, the U.S. Court of Appeals for the Fourth Circuit on Aug. 1 reversed a district court ruling denying a motion to compel arbitration and excluding evidence offered in support of the motion where the arbitration clause was found in a clickwrap agreement.

The facts of Austin were straightforward — the plaintiff sued Experian alleging Fair Credit Reporting Act violations as a result of inaccuracies in his credit report. Experian moved to compel arbitration because the plaintiff had enrolled in CreditWorks, an online credit monitoring service operated by an Experian affiliate.

During the enrollment process, the plaintiff clicked a "create your account" button at the bottom of a web form for entering personal information. Bold text above the button informed the plaintiff that by clicking "create your account," he was accepting and agreeing to terms, including an arbitration clause, that could be viewed via hyperlink.

To support its motion, Experian included a screenshot of the "create your account" page and attached an employee declaration describing the layout and appearance of that page along with a screenshot and the terms as exhibits.

The U.S. District Court for the Eastern District of Virginia granted the plaintiff's motion to exclude the declaration, reasoning that the declarant's job duties didn't establish familiarity with "the activity that lies at the heart of the issue involving the alleged agreement to arbitrate" and that the documents attached to the declaration were hearsay documents.

Given the exclusion of the declaration, the district court then found Experian hadn't provided factual support for the existence of an enforceable arbitration agreement. The court went further, stating that even if it considered the declaration, all that it established was a "deceptive" process through which Experian "lured consumers to a sister company's website for the purpose of allegedly receiving a free credit report."

The Fourth Circuit reversed, finding the website screenshot and terms were not hearsay documents because they were presented to illustrate the enrollment process and existence of the arbitration agreement, not to support the truth of the matter asserted. It also found the employee's level of personal knowledge to be adequate.

Critically, the Fourth Circuit concluded Experian had established the existence of an enforceable agreement.

The court found the design and content of the website would have "put a reasonably prudent user on notice" of the terms because the enrollment page stated in bold text, "[b]y clicking 'Create Your Account' I accept and agree to your Terms of Use Agreement," and the words "Terms of Use Agreement" were set off in blue text on an "uncluttered background" close to the web form and no scrolling or exploring was necessary.

The court also rejected the argument that a clickwrap agreement button must be labeled "I accept" or "I agree," but that "clear and conspicuous notice that a click ... will be taken as assent can do the trick."

Newton v. Experian Information Solutions Inc.

Just days earlier, on July 28, the Eleventh Circuit reversed the denial of a motion to arbitrate under circumstances similar to Newton. There, the plaintiff enrolled in a credit

monitoring account through Experian's affiliate, ConsumerInfo.com Inc.

After finding discrepancies on her credit report, she sued under the FCRA. Experian moved to compel arbitration, citing a clickwrap agreement in the enrollment process and attaching a declaration similar to that used in Austin.

The U.S. District Court for the Southern District of Georgia denied the motion and excluded the declaration, noting that it only attested to knowledge of what a consumer should have seen during enrollment, not what the plaintiff actually saw.

Further, because the plaintiff stated she was not aware that signing up for credit monitoring would result in a jury trial waiver, did not click anything indicating a waiver, and did not see an arbitration agreement or any mention of one, the district court found a genuine dispute of material fact as to her assent.

The Eleventh Circuit reversed. Rejecting the plaintiff's awareness arguments, the court observed that failure to read does not excuse a party's obligations under a contract.

Further, because a reasonably prudent internet user knows that a text highlighted in blue links to a page where additional information is displayed, being presented with a link to a contract constitutes constructive notice of its terms.

Here, the declaration's exhibits showed a disclosure stating that by clicking, a user agreed to the terms of use agreement, and the terms of use were set off in blue text as a hypertext immediately above the "submit secure order" button on the enrollment form.

Accordingly, Experian had established notice and assent.

Practical Implications: Form vs. Function

The upshot of these rulings is good news: Federal courts nationwide are continuing to recognize the validity of clickwrap agreements. Even better, the detailed opinions provide clear guidance for companies as to what layout features help establish notice and assent, and the kind of evidence that can be presented in support of those elements.

But that's not the whole story. Delving into the Austin and Newton opinions is worthwhile due to their nuanced discussions of clickwrap agreement enforceability. The reality is that at times, the aims of improved consumer experience and agreement enforceability are at odds.

Yes, a sleek website and seamless transaction may enhance the user experience and drive revenue. But from a legal perspective, an unquestionably enforceable agreement is the ultimate goal.

Increasingly, the gap between a purchase or enrollment and the presentation of the contract applicable to that interaction is widening. This is particularly true when it comes to purchases made on cell phones, where screen space is limited and the mobile version of a website may vary significantly from its desktop counterpart.

Because of this, there is no substitute for user experience — the Newton court noted that in a prior decision, 2021's Thornton v. Uber Technolgy Inc., the Georgia Court of Appeals found a question of material fact sufficient to preclude compelled arbitration where the plaintiff submitted evidence that a link to terms of use was obscured by a pop-up keyboard when viewed on an Android phone.

Likewise, the Austin court cited a ruling in which a clickwrap agreement was not enforced because text on a website "distracted the purchaser from the service agreement by informing him that clicking served a particular purpose unrelated to the agreement." The lesson: While a consumer can be bound by an agreement without reading it, the consumer still has to have a reasonable opportunity to see the link to it.

Thus, practitioners should be proactive in familiarizing themselves with where their clients use clickwrap agreements, and how they are presented. That a website viewed on a desktop screen appears to provide constructive notice of a clickwrap agreement does not mean it will do so on a mobile device or a different operating system.

While ultimately an employee may be the one attesting to a purchase or enrollment process in court filings, it doesn't hurt to go through the steps yourself. In addition to allowing you to speak authoritatively on the topic, doing so can provide value to your clients by generating ideas for what details to include in a declaration and how to accurately describe the process.

This will continue to be important because not every case will fall into the mold of Austin and Newton. Some courts may not agree that the declarations in those cases included sufficient information. Others may view those showings as a floor and expect more detail if your website differs from Experian's, as it was the party enforcing the clickwrap agreement in both cases.

Counsel should also take note of the increasingly fact-intensive analyses courts engage in when faced with clickwrap agreements. Form can overcome function if a website is not well-designed.

So while practitioners may be used to only weighing in when the terms of an agreement are changed, they should also maintain awareness of when their clients alter the appearance of pages used in enrollment or purchase processes.

Yes, a clickwrap agreement is efficient, but its nature requires diligence and attention to its context. And you don't get a degree in web design to evaluate what a reasonably prudent internet user can see online.

Instead, use your law degree. The context-specific nature of disputes over clickwrap agreements is a perfect opportunity to learn from the losses. Although courts often enforce the agreements, there is no shortage of opinions in which courts have not.

If clickwrap litigation is a significant part of your practice, create a list of design features and wording to avoid as courts continue to evaluate what is acceptable and what is not.

Further, don't be distracted by the digital nature of clickwrap agreements. They are, after all, contracts. As such, issues of enforceability such as notice and assent depend on state contract law. Know which law applies, and whether there are any nuances in the jurisdiction that differ from where you typically practice.

Even if you're familiar with the applicable law, remember that law — yes, even boring old contract law — changes. Monitor developments in basic contract law to ensure enforceability rather than relying on forms.

While you may be tempted to glaze over portions of opinions that recite the elements of

contract formation when you're in a rush to get to the crux of the matter, a particular articulation in a precedential opinion that may not even involve the internet can affect your clickwrap conflicts.

Finally, don't forget what you're trying to enforce — the terms of the contract itself. Routinely review terms and conditions and, if your client has affiliates, take note of whether the terms apply to disputes with those entities as well. Clickwrap agreements can be powerful in spite of their simplicity.

Clickwrap agreements are ubiquitous, and there's no sign their proliferation will ebb anytime soon. The internet moves quickly, so continuing to monitor developments in this space is critical — enforcing advantageous contract terms is just a click away.

Brian Willett is counsel at Saul Ewing LLP.